

Formal Action #7853

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

AT NASHVILLE, TWENTIETH JUDICIAL DISTRICT

STATE OF TENNESSEE,

Plaintiff,

v.

WHITNEY LEADERSHIP GROUP, INC.

and RUSSELL A. WHITNEY,

Defendants.

AGREED FINAL ORDER

Plaintiff, the State of Tennessee, by and through John Knox Walkup, the Attorney General and Reporter, on behalf of the Division of Consumer Affairs of the Department of Commerce and Insurance, and Defendant, Whitney Leadership Group, Inc., a Florida corporation ("Defendant"), as evidenced by their

signatures, do consent to the entry of this Agreed Final Order and its provisions. Defendant, Russell A. Whitney was voluntarily dismissed by the State as a Defendant in this case without prejudice, on March 5, 1997. Defendant enters into this Order solely to avoid the time and expense associated with litigation. Defendant has admitted no liability in this matter and denies all the allegations in the State's Complaint.

This Order only resolves matters set forth in the State's Complaint. Defendant hereby accepts and expressly waives any defect in connection with service of process issued on the Defendants by the State.

1. AGREED TERMS RELATING TO BUSINESS PRACTICES

Accordingly, it is hereby agreed that upon approval of the Court, within the State of Tennessee, Defendant shall be permanently and forever enjoined and bound from directly or indirectly engaging in practices in violation of the terms set forth herein:

1.1 Defendant shall not, directly or indirectly, engage in any unfair or deceptive acts or practices in the conduct of its business and shall fully abide by all provisions of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. §§ 47-18-101, *et seq.*

1.2 Unless Defendant clearly and conspicuously discloses that the results illustrated or used in an advertisement or other promotional material are rare, highly unusual, exceptional or atypical and not to be expected by the average person, the Defendant shall not directly or indirectly represent, state, advertise or promote in any fashion its program, goods or services using illustrations or examples that are not representative of the results that Tennessee consumers can expect to obtain from using Defendant's goods or services. Without limiting the scope of this provision, if Defendant disseminates television advertisements on cable television stations located outside the State of Tennessee relating to the issues addressed in this paragraph and those advertisements fully comply with all Federal Trade Commission rules and regulations relating to these issues, the Defendant will be considered in compliance with this paragraph.

(For the purpose of this Order, the terms "represent", "state", "advertise", "solicit" and "promote" all refer to direct and/or indirect representations. These terms, for the purposes of this Order, are interchangeable.)

1.3 Prior to representing in an advertisement that Defendant's President "swears under oath" or term or phrase of similar import, Defendant shall execute a sworn affidavit and the sworn statement shall be made attesting to the best of affiant's knowledge and belief, the truth of the statement and shall be under oath subject to the penalties for perjury.

1.4 Defendant shall not directly or indirectly represent that "you" will or can have specific financial opportunities, results or claims unless (1) Defendant can substantiate that those financial opportunities, results or claims will in fact be available to every consumer without exception or (2) Defendant clearly and conspicuously discloses that not all consumers may obtain those opportunities, results, or claims or will not qualify for that particular opportunity, result or claim.

1.5 Defendant shall not directly or indirectly represent its workshop or materials in such a way as to indicate to consumers that particular programs or items such as the "Bird Dog Program" and a "\$60,000 credit line" are available to everyone unconditionally, unless (1) each and every consumer will have access to such programs without exception or (2) Defendant clearly and conspicuously discloses that all consumers will not be eligible for all programs.

1.6 Defendant shall be required to clearly and conspicuously disclose in the initial advertisement to consumers that a primary purpose of the workshop or seminar being promoted is to offer for sale Defendant's book and other wealth building materials, if such is the case.

1.7 Defendant shall not directly or indirectly represent to consumers that a specific dollar amount of credit will be available to every consumer, if in fact the consumer is eligible for a credit line of dollar amount in a particular range up to that amount. Without limiting the scope of this provision, the Defendant shall not directly or indirectly represent to consumers that they will receive "a \$60,000 credit line" without restriction, if such is not the case. This provision specifically prohibits Defendant from representing "Get a \$60,000 credit line", (or term or phrase of similar import) where the "credit lines" available are actually for between \$1,000.00 to \$60,000, unless Defendant clearly and conspicuously discloses the actual range of the credit line available.

1.8 Defendant shall not, directly or indirectly, during any introductory workshop or any other informational seminar or meeting, or in any advertisement, telemarketing solicitation or promotional material, represent or imply that profits or earnings as reflected in the illustrations used are the average experience of a consumer using Defendant's "Wealth Building" program, if such is not the case. If Defendant make claims or use illustrations that may not reflect the average experience of a consumer using Defendant's goods or services, Defendant shall make an appropriate, effective, clear and conspicuous disclaimer. Further, verifiable substantiation for any claims or illustrations must be readily available when the representation is made, consumers must be informed it is available, and the substantiation must be provided to consumers upon request.

1.9 Defendant shall not directly or indirectly use testimonials or endorsements from persons who participated in these workshops and elected to use Defendant's goods or services unless (a) the person giving the testimonial was not paid in any way for the testimonial, (b) all information relating to any earnings or profits claimed are fully, conspicuously and clearly disclosed, (c) the testimonial is illustrative of typical results that average consumers in Tennessee can actually expect to achieve from following the course instructions, (d) it completely reflects the honest opinions, findings, beliefs or experience of the endorser or person giving the testimonial, and (e) Defendant does not include any representations which are incomplete, deceptive, misleading, unfair or cannot be fully and completely substantiated if made directly by Defendant. This provision prohibits, for example, promoting a specific profit or income level by inferring that the profit was realized immediately or within a certain time frame when, in fact, that profit was realized over a period of time.

1.10 Defendant shall fully comply with the Federal Trade Commission Guides Concerning Use of

Endorsements and Testimonials in Advertising, 16 § C.F.R. 255.

1.11 If representations used by the Defendant are based solely on the President or one individual's personal experiences, the Defendant shall clearly and conspicuously disclose that fact to consumers.

1.12 Defendant shall not use the term "rich", or any term or phrase of similar import which implies a level of financial success unless Defendant clearly and conspicuously discloses that the Defendant's use of the term "rich" does not refer to financial success but is intended to refer to other standards such as spiritual richness or fulfillment, if in fact Defendant uses the term "rich" intending to refer to other standards of "rich" besides financial success.

1.13 Defendant shall not directly or indirectly encourage consumers to register for Defendant's program based on an assertion that "seating is very limited" or term or phrase of similar import, if seating is not, in fact, reasonably limited.

1.14 Defendant shall fully comply with Tenn. Code Ann. § 47-18-120 when offering a prize, gift, award or thing of value to consumers.

1.15 Defendant shall be prohibited from representing or implying that consumers attending will receive a specified amount of money in cash such as "\$100" "free", if such is not the case.

1.16 Defendant shall fully comply with the Federal Trade Commission's Guide Concerning Use of the Word "Free" and Similar Representations, 16 §C.F.R. 251.

1.17 Defendant shall be required to clearly and conspicuously list its company name and full address in all advertisements in the State of Tennessee.

1.18 Defendant shall not, directly or indirectly, represent that its goods or services have sponsorship, approval, characteristics, uses or benefits that they do not have or that a person has a sponsorship approval, status, affiliation or connection that such person does not have, in violation of Tenn. Code Ann. § 47-18-104(b)(5).

1.19 Defendant shall not, directly or indirectly, make any representations to consumers that a transaction confers or involves rights, remedies or obligations that it does not have or involve, or which are prohibited by law in violation of Tenn. Code Ann. § 47-18-104(b)(12).

1.20 In the State of Tennessee, Defendant shall not conduct any workshops, seminars or programs of any type which violate this Order or any portion thereof.

1.21 In the State of Tennessee, Defendant shall not advertise in any fashion which violates this Order or any portion thereof.

Defendant specifically states that by agreeing to paragraphs 1.1-1.21, Defendant does not admit that it has engaged in the past in the conduct described therein.

2. JURISDICTION

2.1 Jurisdiction of this Court over the subject matter herein and over the person of the Defendant for the purposes of entering into and enforcing this Order is admitted. Jurisdiction is retained by this Court for the purpose of enabling the parties to apply such further orders and directions as may be necessary or appropriate for the construction, modification or execution of this Order, including enforcement of compliance therewith and assessment of penalties for violation(s) thereof. The Defendant has specifically indicated that it might move the Court for a modification of this Order if a change in the Tennessee Consumer Protection Act results in the terms of this Order containing contradictory requirements.

3. CANCELLATION OF WORKSHOP

3.1 Defendant represents and warrants that Defendant canceled the workshop which was scheduled for the Doubletree Hotel in Nashville on December 14 and 15, 1996. Further, no consumer that responded to the advertisements promoting that workshop has been affirmatively solicited by Defendant to attend a workshop at a later time or to purchase goods or services unless they have also been provided with correct information in compliance with section 1 of this Order. As a result, to the best of Defendant's knowledge, Defendant represents that no consumer is eligible for a refund or restitution as a result of the allegations in the State's Complaint. Defendant understands that the State expressly relies upon Defendant's representation that this information is accurate, true and not misleading and if this representation is false, inaccurate, or misleading, the State has the right to move to vacate or set aside this Order and request relief pursuant to Tenn. Code Ann. § 47-18-108(c), Tenn. Code Ann. § 16-1-103 and Tenn. Code Ann. § 29-9-101, *et seq.*, if the State so elects.

4. PAYMENT OF ATTORNEYS' FEES AND COSTS TO THE STATE

4.1 Defendant shall pay the sum of Seven Thousand Five Hundred and 00/100 Dollars (\$7,500.00) to the State of Tennessee for attorneys' fees and costs of investigation, enforcement and monitoring for compliance of this matter, which may be used for consumer protection purposes at the sole discretion of the Attorney General. Said payment shall be made by providing the Attorney General or his designated representative a cashier's or certified check made payable to the State of Tennessee on the day of execution of this Order.

5. PAYMENT TO GENERAL FUND

5.1 Defendant shall pay the sum of Two Thousand and 00/100 Dollars (\$2,000.00) to the State of Tennessee which shall be deposited into the General Fund of the State of Tennessee. Said payment shall be made by providing the Attorney General or his designated representative a cashier's or certified check

made payable to the State of Tennessee on the day of execution of this Order.

6. MONITORING AND COMPLIANCE

6.1 Upon request, by and through Defendant's attorneys, Defendant agrees to provide books, tapes, records and documents to the State at any time, and further, to informally or formally under oath, provide testimony and other information to the State relating to compliance with this Order. Nothing in this section shall require the Defendant to (1) produce materials already produced to the State or (2) produce any materials if Defendant is not doing business in the State of Tennessee. However, the State requires that the Defendant direct the State to the correct portion of any materials previously provided to respond to new questions from the State. Defendant shall make any requested information available within two (2) weeks of the request or forty-eight (48) hours prior to conducting any seminar or workshop in the State of Tennessee whichever is shorter, at the Office of the Attorney General or at any other location within the State of Tennessee that is mutually agreeable in writing to Defendant and the Attorney General. The State agrees to act in good faith and request documentation under this section as rapidly as reasonably possible to permit the Defendant the maximum amount of time to respond to the inquiry. This section shall in no way limit the State's right to obtain documents, information, or testimony pursuant to any federal or state law, regulation, or rule. The Defendant has not waived its right to assert the Fifth Amendment if the State requests testimony.

6.2 Without limiting paragraph 6.1, Defendant specifically agrees to respond in the time frame set forth in paragraph 6.1 to any requests from the State relating to changes in Defendant's corporate structure, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or firm, the creation or dissolution or subsidiaries, or any other changes in Defendant's status that may effect compliance with obligations arising out of this Order.

6.3 Defendant agrees that the State may send observers to any workshop or seminar conducted by the Defendant in the State of Tennessee without prior notice to the Defendant. Further, in the event, that the State elects to attend any workshop or seminar conducted by the Defendant and after attending, the State decides it would like to obtain an audiotape of the presentation, the Defendant shall provide the State with a copy of the audiotape of the presentation within five (5) days of receipt of such a request, if an audiotape is available.

7. PRIVATE RIGHT OF ACTION

7.1 Pursuant to Tenn. Code Ann. § 47-18-109, nothing in this Order shall be construed to affect any private right of action that a consumer may hold against Defendant.

8. PENALTY FOR FAILURE TO COMPLY

8.1 Defendant understands that upon execution and filing of this Order, any subsequent failure to comply with the terms of this Order shall be enforced in compliance with the Tennessee Consumer Protection

Act.

8.2 Defendant understands that any knowing violation of the terms of this Order is punishable by civil penalties of not more than Two Thousand Dollars (\$2,000.00) for each violation, in addition to any other appropriate penalties and relief pursuant to Tenn. Code Ann. § 47-18-108(c), Tenn. Code Ann. § 16-1-103, and Tenn. Code Ann. § 29-9-101, *et seq.*, including but not limited to and the imposition of attorneys' fees and civil penalties. Defendant agrees to pay all court costs and attorneys' fees associated with any successful petitions to enforce this Order.

9. VENUE

9.1 Pursuant to Tenn. Code Ann. § 47-18-107, venue as to all matters between the parties relating hereto or arising out of this Order is solely in the Chancery Court of Davidson County, Tennessee.

10. REPRESENTATIONS AND WARRANTIES

10.1 Defendant represents and warrants that the execution and delivery of this Order is its free and voluntary act, that this Order is the result of good faith negotiations, and that Defendant believes that the Order and terms hereof are fair and reasonable. The parties warrant that they will implement the terms of this Order in good faith.

10.2 Defendant represents that the signatories to this Order have authority to act for and bind the Defendant.

10.3 Defendant will not participate, directly or indirectly, in any activity to form a separate entity or corporation for the purpose of engaging in acts set forth and prohibited in this Order or for any other purpose which would otherwise circumvent any part of this Order or the spirit or purposes of this Order.

10.4 Neither Defendant nor anyone acting on its behalf shall state or imply or cause to be stated or implied that the Attorney General, the Division of Consumer Affairs, or any other governmental unit of the State of Tennessee approved, sanctioned, or authorized any practice, act, or conduct of the Defendant. Nothing in this paragraph shall prohibit the Defendant from stating to persons that Defendant has entered into a settlement with the State of Tennessee resolving the State's Complaint or from providing copies of the settlement to persons upon request.

10.5 Acceptance of this Order by the State shall not be deemed approval by the State of any of Defendant's advertising or other business practices.

10.6 Within thirty (30) days of the entry of this Order, Defendant shall submit a copy of this Order to Defendant's officers, directors or other persons and entities that they control, manage or operate. Within forty-five (45) days of entry of this Order, Defendant shall provide the State with an affidavit verifying and certifying that all required persons have been supplied with a copy of this Order.

10.7 Defendant warrants and represents that it is a proper party to this Order. Defendant further acknowledges that the State expressly relies upon this representation and warranty, and that if it is false, misleading, unfair or inaccurate, the State has the right to move to vacate or set aside this Order, and request this Court for relief pursuant to Tenn. Code Ann. § 47-18-108(c), Tenn. Code Ann. § 16-1-103, and Tenn. Code Ann. § 29-9-101, *et seq.*, if the State so elects.

10.8 Whitney Leadership Group, Inc. represents that it is the true legal name of the corporate entity entering into this Order. Defendant understands that the State expressly relies upon this representation and if this representation is false, inaccurate, unfair or misleading, the State has the right to move to vacate or set aside this Order, and request relief pursuant to Tenn. Code Ann. § 47-18-108(c), Tenn. Code Ann. § 16-1-103, and Tenn. Code Ann. § 29-9-101, *et seq.*, if the State so elects.

10.9 This Order may only be enforced by the parties hereto.

10.10 The titles and headers to each section of this Order are for convenience purposes only and are not intended by the parties to lend meaning to the actual provisions of the Order.

10.11 This document shall not be construed against the "drafter" because both parties participated in the drafting of this document.

10.12 This Order constitutes the complete agreement of the parties with regard to the resolution of the matters set forth in the State's Complaint. This Order is limited to resolving only those matters set forth in the State's Complaint.

10.13 Nothing in this Order shall be construed to limit the authority of the Attorney General to protect the interests of the State or the people of the State of Tennessee. In addition, this Order shall not bar the State or other governmental entity from enforcing laws, regulations or rules against Defendant.

10.14 This Order shall be binding and effective against Defendant upon Defendant's signing the Order.

10.15 Defendant, through its counsel on March 5, 1997 provided a letter to counsel for the State wherein it stated that all of the actions of Russell A. Whitney taken with regard to the seminars Defendant proposed to run in Tennessee were within the scope of his authority as an officer of Defendant Whitney Leadership Group, Inc. Defendant acknowledges that the State relied upon the representations in this letter and agreed to dismiss Russell A. Whitney, individually, as a Defendant in this cause by Order which was entered on March 5, 1997. Defendant further acknowledges that if any of the representations in that letter are false, misleading or inaccurate, the State has the right to move the Court to vacate or set aside this Order as well as the Order dismissing Russell A. Whitney individually as a Defendant, and request relief pursuant to Tenn. Code Ann. § 47-18-108(c), Tenn. Code Ann. § 16-1-103, and Tenn. Code Ann. § 29-9-101, *et seq.*, if the State so chooses.

11. COMPLIANCE WITH ALL LAWS

11.1 Nothing in this Order shall be construed as relieving Defendant of the obligation to comply with all state or federal laws, regulations and rules.

12. FILING OF ORDER

12.1 Upon the execution of this Order, the Attorney General shall prepare and file this Order for the Court's approval. Defendant agrees to pay all costs of filing such Order.

13. APPLICABILITY OF ORDER TO DEFENDANT

AND ITS SUCCESSORS

13.1 Defendant agrees that the duties, responsibilities, burdens and obligations undertaken in connection with this Order shall apply to the Defendant, the Defendant's officers, directors or other persons and entities they control, manage or operate while acting in their official capacities.

14. COSTS

14.1 All costs associated with the filing and distribution of this Order and any other incidental costs or expenses incurred thereby shall be borne by Defendant. No costs shall be taxed against the State as provided by Tenn. Code Ann. § 47-18-116. Further, no discretionary costs shall be taxed against the State.

IT IS SO ORDERED, ADJUDGED AND DECREED